IN THE SUPREME COURT OF THE STATE OF MICHIGAN
(ON APPEAL FROM THE COURT OF APPEALS)

GARY AND KATHY HENRY, et al.,	
Plaintiffs-Appellees,	S.C. No. 125205
v.	C.A. No. 251234
THE DOW CHEMICAL COMPANY	
Defendant-Appellant.	Saginaw County Circuit Court No. 03-47775-NZ Hon. Leopold P. Borrello

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, COALITION FOR LITIGATION JUSTICE, INC., AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 800 *amicus curiae* briefs in federal and state courts.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing 1,003 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member

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[1] The Coalition includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, St. Paul Travelers Companies, Inc., Everest Re, and the Great American Insurance Company.

companies account for $154 billion in direct written premiums. They account for 48.2% of all personal auto premiums written in the United States, and 36.9% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry.

STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case of Defendant-Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained a physical injury. This rule was created for a reason. To determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective showing that an individual has been harmed. Medical monitoring claims, as proposed by Plaintiffs-Appellees in this case, do away with this time-honored rule, allowing plaintiffs to recover based on the mere subjective guess about the *possibility* of a future injury.

From a practical perspective, judicial adoption of medical monitoring claims in Michigan would foster widespread litigation with potentially crippling liability, leaving no potential defendant whose products are used by society untouched. Almost everyone either ingests as food or medicine or otherwise comes into contact with a potentially limitless number of materials that, arguably, may warrant medical monitoring relief. This snowballing effect would lead to an unsound diversion of resources from the truly injured. Developing a system for the fair and equitable administration of medical monitoring claims would be a monumental and resource-

consuming task for the judiciary. If this Court were to create a claim for medical monitoring absent physical injury, such a decision would have significant negative consequences in Michigan and beyond, when future state and federal courts consider whether to allow medical monitoring claims for mere exposure in their own jurisdictions. This Court should neither recognize nor endorse new claims involving such a substantial departure from fundamental tort law. Nor should this Court assume, or encourage other courts to assume, the broad policymaking role assigned to the legislative branch.

Major substantive changes in fundamental tort laws, such as the recognition of the medical monitoring, are much better left to the Legislature. The Legislature is better equipped to make far-reaching changes in the substantive law because of its information-gathering ability, prospective treatment of new laws, and broad perspective. The Legislature also is in the best position to structure the elements required to prove entitlement to medical monitoring and set up a scientifically, medically and financially sound system that is fair and equitable to all.

ARGUMENT

I. PERMITTING MEDICAL MONITORING CLAIMS ABSENT PRESENT PHYSICAL INJURY IS POOR PUBLIC POLICY

For over 200 years, one of the fundamental principles of tort law has been that a plaintiff cannot recover without proof of a physical injury. *See* William L. Prosser, *Handbook on the Law of Torts* § 54, at 330- 33 (4th ed. 1971).[2] At times, this bright line rule may seem harsh, but it is

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[2] Michigan law has long followed the traditional physical injury rule. *See Bogaerts v. Multiplex Home Corp. of Mich*, 423 Mich. 851, 851, 376 N.W.2d 113, 113 (1985) (reinstating trial court order vacating emotional damages award where plaintiffs "failed to allege and prove a sufficient physical injury"); *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395 (1970) (recovery available only where a "definite and objective physical injury is produced as a result of emotional distress proximately caused by

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the best filter the courts have been able to develop to prevent a flood of claims, to provide faster access to courts for those with "reliable and serious" claims, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997), and to ensure that defendants are held liable only for genuine harm. Medical monitoring cases brought by plaintiffs with no past or present manifest injury cannot be reconciled with the traditional "physical injury" rule in tort law.

Courts may be tempted to permit recovery for medical monitoring because the claims have "emotional and political appeal" and our society has developed a "heightened sensitivity to environmental issues." Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 121 (1995) [hereinafter "Martin & Martin"]. Nevertheless, the significant problems surrounding medical monitoring awards absent physical injury show that the law should not be stretched to recognize such claims. *See* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999) [hereinafter "Schwartz"]. The majority of medical professionals disagree with those courts that believe a claim for medical monitoring is valid for every type of health condition. As one medical scholar notes:

> The enthusiasm generated over the past several years for medical monitoring, or as it is often called, medical surveillance, has been extensive. The excessive claims made in its name in regard to the prevention of disease have little or no relation to reality or objectivity, and it would seem the time has come to recall A.J. Balfour's apt comment, "It is unfortunate, considering that

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defendant's negligent conduct"); *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1 (1987) (cancer-related claims does not accrue until "the discoverable appearance of cancer"). *See also Meyerhoff v. Turner Constr. Co.*, 456 Mich. 933, 575 N.W.2d 550 (1998) ("we "VACATE that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages.").

> enthusiasm moves the word, that so few enthusiasts can be trusted to speak the truth."

W.K.C. Morgan, *Medical Monitoring with Particular Attention to Screening for Lung Cancer, in Occupational Lung Disease* 157 (J. Bernard L. Gee et al. eds., 1984).

A. MEDICAL MONITORING WILL LEAD TO A FLOOD OF LITIGATION, CLOGGING ACCESS TO COURTS AND DEPLETING RESOURCES THAT WOULD BE BETTER USED TO COMPENSATE THE TRULY INJURED

Allowing a claim for medical monitoring for asymptomatic plaintiffs would be likely to attract a flood of new lawsuits to the state. This concern, among others, was a primary reason for the United States Supreme Court to reject medical monitoring claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* Over the years, FELA has been subject to construction that is very favorable to plaintiffs. *See, e.g., Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) ("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Pry v. Alton & S. Ry. Co.*, 698 N.E.2d 484, 499 (Ill. App. 1992) (stating that under FELA "[o]nly slight negligence of the defendant needs to be proved"). But not even this consistent and overwhelming pro-plaintiff construction would permit the U.S. Supreme Court to embrace medical monitoring under FELA. The Court recognized the obvious and unacceptable implications of permitting these claims: "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring." *Metro-North*, 521 U.S. at 440.

Aligning with the U.S. Supreme Court, commentators have noted that allowing medical monitoring claims for asymptomatic plaintiffs will impose astronomical costs on defendants, because "we may all have reasonable grounds to allege that some negligent business exposed us

to hazardous substances." Martin & Martin, *supra* at 131; Schwartz, *supra* at 1071 ("[C]ourts awarding medical monitoring produce results that can allow for unfettered recoveries and lead to an avalanche of claims."). An example of the "enormity of the universe of potential medical monitoring plaintiffs" is the amount of potentially hazardous substances with which the public comes into contact. Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize*?, 27 Wm. Mitchell L. Rev. 521, 528 (2000) [hereinafter "Maskin et al."].[3]

Because so many individuals may qualify as potential medical monitoring claimants, plaintiffs' attorneys could basically recruit people off the street to serve as plaintiffs. No longer would plaintiffs' attorneys have to wait for injury to file suit. The familiar advertisement, "Have you been injured?" could become, "Don't wait until you're hurt, call now!" Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now*!, USA Today, July 5, 1999, at A17.

As a result, Michigan courts could become clogged with speculative medical monitoring claims. The case currently before this Court already has 173 plaintiffs and they are seeking classes of thousands of members. Access to justice for those with present, serious, physical injuries may be delayed or denied. As one court rejecting medical monitoring noted,

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action

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[3] The Environmental Protection Agency reported in 1992 that nearly 20 percent of the U.S. population, or approximately 40 million people, live within four miles of a hazardous waste site on the National Priority List. *See* Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 Colo. Law. 1533, 1533 (1994) (citing U.S. Department of Health and Human Services, Hazardous Substances & Public Health (Atlanta: Agency for Toxic Substances and Disease Registry, Vol. 2, No. 2, May/June 1992) at 1)).

> could potentially devastate the court system as well as defendants. . . . There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (emphasis added).[4]

The experience of litigating asbestos claims vividly illustrates how filings dramatically rise when requirements for filing suits are significantly diminished. Early in the litigation, courts empathetic to the claims of plaintiffs deviated from accepted legal principles to permit recoveries that traditionally would have been barred. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial. Advoc. 247 (2000). While the courts undoubtedly had good intentions, the litigation turned into a judicial "disaster of major proportions." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee* 2 (1991). Unimpaired plaintiffs are now flooding the tort system, causing over seventy employers to file for bankruptcy protection. *See, e.g.,* Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 158, *available*

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[4] Experience in Louisiana since *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355 (La. 1998), has demonstrated that recognition of medical monitoring will lead to more litigation. *See, e.g., Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10 (La. App. 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided that each claimant started smoking on or before Sept 1, 1988), *writ denied*, 731 So. 2d 189 (La. 1999).

at 2002 WL 2190334; Karen Kerrigan, Editorial, *Asbestos Suits Imperil Small Michigan Firms*, Detroit Free Press, Nov. 3, 2002, *abstract available at* 2002 WL 102335572.[5] The ability of current and future claimants to obtain full and prompt compensation for actual injuries is threatened. *See, e.g.,* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, *available at* 2002 WL-WSJ 3392934.

In addition, medical monitoring claims in the workplace setting could fall outside of the workers' compensation system, which could subject employers to endless liability. Generally, workers' compensation systems afford the exclusive remedy for an injured worker. *See* Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Desk Edition* § 100.01 (2000). One exception to this rule is that an employee may sue an employer for injuries not within the scope of the worker's compensation statute. This is logical as a general proposition, because to hold otherwise would mean that no recovery is available for injuries falling outside of the worker's compensation system. It is not hard to imagine a situation in which, more than six years after a plaintiff was last exposed to a substance, a report is issued indicating that the substance may increase the plaintiff's risk of disease by a minimal 1-in-100,000 (equating to a 99,999-in-100,000 chance that the plaintiff will **never** develop the disease), which is all that some state courts require for medical monitoring claims to proceed. The employer could then be liable for

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[5] *See also* Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report* 20 (RAND Inst. for Civil Justice, Sept. 2002); Jennifer Biggs et al., *Overview of*

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the cost of monitoring for the onset of the disease in which there is a 99,999-in-100,000 chance that plaintiff will **never** contract the "feared" medical condition, because worker's compensation claimants face a six-year statute of limitations in Michigan. *See* Mich. Comp. Laws Ann. § 600.5813 (2003). Examples of situations in which this could happen abound: gas station attendants exposed to gasoline fumes, or barbers and beauticians exposed to chemical fumes from hair products, to name just two. Virtually every employer could be at risk of being responsible for employee health care costs indefinitely, even though there is virtually no chance – *i.e.*, only 1-in-100,000 – that the plaintiff will contract the disease.

B. MEDICAL MONITORING IS LIKELY TO PROVIDE AN UNDESERVED WINDFALL TO HEALTHY PLAINTIFFS

1. Lump-Sum Medical Monitoring Awards Create The Opportunity For Abuse.

Courts cannot dictate how recipients will spend a lump-sum award. "Since the medical monitoring award itself is not appropriately monitored, there is no assurance that the award, however large, will be used to help a person detect the onset of treatable disease." *See* Schwartz, *supra* at 1077-78.[6] As one commentator has noted,

> [t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems

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Asbestos Issues and Trends 3 (Dec. 2001), *available at* <http://www.actuary.org/mono.htm> (last visited July 29, 2004).

6 *See, e.g., Lilley v. Bd. of Supervisors of La. State Univ.*, 735 So. 2d 696 (La. App. 1999), *writ denied*,744 So. 2d 629 (La. 1999). Merely one year after the Louisiana Supreme Court recognized medical monitoring as a cause of action, the trial court awarded $12,000 per plaintiff for medical monitoring *despite the fact the* Bourgeois *court expressly declined to extend its holding to claims for lump sum damages. Bourgeois*, 716 So. 2d at 357 n.3. The award was overturned on appeal.

negligible.

Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 Wm. Mitchell L. Rev. 521, 540 (2000) [hereinafter "Maskin et al."]. Any person who was even momentarily exposed to a toxic substance will have a difficult time turning down a windfall. "[T]he potential for abuse is apparent." George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation*, 45 Rutgers L. Rev. 227, 283 (1993) [hereinafter "McCarter"].

The New Jersey Supreme Court's decision in *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987), illustrates the fact that awards for medical monitoring often may not lead to any medical monitoring whatsoever. In *Ayers*, 339 plaintiffs, all without present physical injury, were each awarded over $8 million as a lump sum for medical monitoring. *See id.* at 291. One author conducted an informal survey of the plaintiffs after the lawsuit. While the survey garnered only three responses, they may be telling: one plaintiff noted that he used his recovery to buy a home and that after receiving his award, he had not seen his doctor any more than in prior years. The two other respondents, who could not even remember if the damages they received were for medical monitoring, reported they did not see their doctors more frequently as a result of the award. *See* McCarter, *supra*, at 257-58 n.158.

The testimony of some plaintiffs who have sought medical monitoring damages is an indicator of the level of their unwillingness to use any funds for monitoring and lack of desire to be tested. In *Ironbound Health Rights Advisory Board Commission v. Diamond Shamrock Chemical Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990), motion practice left medical monitoring as the only damage claim remaining for most of the ninety-seven plaintiffs in a

dioxin exposure suit. *See* McCarter, *supra*, at 270 n.212. In one plaintiff's deposition, the defense attorney asked the plaintiff if he had ever been or ever wanted to be tested to discover if he had any toxic substance in his body. The plaintiff seeking medical monitoring replied, "I don't know. I don't know if I want to know." *Ironbound*, 578 A.2d at 1249.

At trial, the plaintiffs were cross-examined about whether they had ever expressed their concerns about their exposures to their doctors during doctor visits in the time leading up to trial. Time and time again, plaintiffs responded they had not mentioned any such concerns, though they knew of the exposures at the time of the visits. McCarter, *supra* at 270-71 n.212. For instance, one plaintiff testified:

> Q: Did you discuss with the doctor your concerns about dioxin exposure?
>
> A: I had no reason to. I was there to get my bus license.

Id. at 270 n.212. Another plaintiff similarly did not mention his exposure to his doctor:

> Q: Is that, in fact, true that you did see a doctor for a physical exam within the year preceding [your deposition in this case]?
>
> A: Yes I guess, I've seen a doctor on occasion.
>
> Q: Okay. Well, now, when you saw that doctor, you didn't mention to him your concerns about exposure to dioxin, did you?
>
> A: No, it was – didn't come to my mind.

Id. at 270-71 n.212. Other plaintiffs gave similar testimony. *Id.* The fact that these plaintiffs did not alert their doctors to their exposures during routine visits may suggest other plaintiffs will not be quick to do so either if they are allowed to bring medical monitoring claims under Michigan law.

Similarly, in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993), workers sought medical monitoring because of asbestos exposure. Nearly seven years after learning of

their exposure, the plaintiffs participated in only preliminary examinations revealing no asbestos-related illness. Other than the preliminary tests, the plaintiffs underwent no further testing. As one commentator remarked, "[t]he fact that none had undergone testing over a period of almost seven years casts grave suspicion over their assertions that they would use any medical monitoring sums awarded for their stated purpose." Maskin et al., *supra* at 541-42.

These examples show that medical monitoring awards may not result in the plaintiff actually being monitored. As one group of commentators noted:

> The incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible. The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation. Visiting a physician is not something many people wish they could do more often.

McCarter, *supra* at 283. If plaintiffs do not wish to use the money they receive from medical monitoring awards for actual medical monitoring because they do not believe there is a significant risk of the onset of disease, courts should not require defendants to allocate scarce resources for such speculative claims.

2. Alternatives to Lump-Sum Awards Will Burden Courts.

A court could try to avoid the problems created by lump-sum damages awards by creating a court-administered fund, but even this solution would be likely to create high, ongoing administrative costs for the court system and its personnel.

Devising a sound medical monitoring plan would require, at a minimum, specifying the nature and amount of benefits available, the source of funding and funding allotments, the procedures for determining eligibility for monitoring, the payment mechanism for the provider

and the percentage of provider reimbursement, when eligible parties may join the program, the length of time the program should last, the frequency of any periodic monitoring and the circumstances in which the frequency can be changed to allow special monitoring, the content of the monitoring exams, whether the facility testing will be formal or informal, and whether the service provider is to be designated by the court or chosen by the claimant. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994); Gary R. Krieger et al., *Medical Surveillance and Medical Screening for Toxic Exposure, in* Clinical Envtl. Health & Toxic Exposures 108, 113-15 (John B. Sullivan, Jr. & Gary R. Krieger eds., 2d ed. 2001); Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What Is it, How Can it Be Improved?*, 87:2 Am. J. of Clinical Pathology 285, 286-87 (Myrton F. Beeler et al., eds. 1987); [hereinafter "Beeler & Sappenfield"]; David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890 [hereinafter "Studdert et al."].

Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program's designers erroneously estimate funding needs or the number of eligible participants. Administrative intricacies compound in the instance of medical monitoring class actions, where courts would have to manage each class member's monitoring program, a task that would place "additional strains on courts that should be hesitant to undertake such a costly and time-consuming responsibility." Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?*, 70 Def. Counsel J. 315, 320 (2003).

C. OTHER COURTS HAVE WISELY REJECTED MEDICAL MONITORING CLAIMS ABSENT PRESENT PHYSICAL INJURY

Since the United States Supreme Court refused to recognize medical monitoring as a cause of action under FELA in *Metro-North, supra*, courts have steered away from adopting medical monitoring claims for mere exposure. Recently the Supreme Courts of Nevada, Alabama, and Kentucky have reaffirmed the fundamental tort law principle that damages are not recoverable absent a present physical injury. The medical monitoring claims at issue in those decisions related to exposure to a wide range of substances, including asbestos, cigarette smoke, water pollution, and prescription drugs.

1. The United States Supreme Court Has Reviewed and Rejected Medical Monitoring

In *Metro-North, supra*, the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim brought by a pipefitter against his employer under the FELA for occupational exposure to asbestos. The case involved a highly sympathetic to the plaintiff who had literally been covered with asbestos while doing work for a railroad. Moreover, over the years, FELA has been subject to construction that is very favorable to plaintiffs. *See, e.g., Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) ("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Pry v. Alton & S. Ry. Co.*, 698 N.E.2d 484, 499 (Ill. App. 1992) (stating that under FELA "[o]nly slight negligence of the defendant needs to be proved"). Yet, the United Sates Supreme Court closely considered the serious policy concerns militating against adoption of a medical monitoring cause of action. These include the difficulty in identifying which medical monitoring costs are over and above the preventative medicine ordinarily recommended for

everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs. *See* 521 U.S. at 441-42.

The Court appreciated that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id.* at 442. Defendants, in turn, would be exposed to unlimited liability; a "flood of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. *Id.* The Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative, collateral sources of monitoring are often available, such as through employer-provided health insurance plans.[7] The Court said that "where state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits" because recovery would be allowed "irrespective of the presence of a 'collateral source' of payment." *Id.* at 434.

2. The Nevada Supreme Court Has Refused to Recognize Medical Monitoring

In *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001), the Nevada Supreme Court rejected claims by smokers and casino workers who brought class actions seeking the establishment of a court-supervised medical monitoring program to aid in the early diagnosis and treatment of alleged tobacco-related illnesses. The court held that "Nevada common law does

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[7] Medical monitoring "may be an extremely redundant remedy for those who already have health insurance." Maskin et al., *supra* at 528. Approximately 80 percent of all standard medical testing is paid for by third party insurance. *See* Am. Law Inst., 2 *Enter. Responsibility for Pers. Injury – Reporters' Study* 379 (1991).

not recognize a cause of action for medical monitoring," *id.* at 438, observing that medical monitoring is "a novel, non-traditional tort and remedy." *Id.* at 441. The court stated that "[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function." *Id.* at 440

3. The Alabama Supreme Court Has Rejected Medical Monitoring in the Absence of a "Manifest, Present Injury"

The Alabama Supreme Court considered medical monitoring in *Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001), which involved a claim by a citizen who alleged that he had been exposed to polychlorinated biphenyls ("PCBs") that were reportedly released into the environment by the defendant. The Alabama Supreme Court refused to recognize a medical monitoring cause of action in the absence of a "manifest, present injury." *Id.* at 829. The court stated that "[t]o recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide" – a voyage on which the court was "unprepared to embark." *Id.* at 830. The court also discussed a number of public policy concerns, such as a potential never-ending avalanche of claims and the unlimited liability exposure for defendants. It realized that "a 'flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury and adversely affect the allocation of scarce medical resources. *Id.* at 831 (quoting *Metro-North*, 521 U.S. at 442 (internal citations omitted)). The court concluded: "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness." *Id.* at 831-32.

4. The Kentucky Supreme Court's Recent Ruling Provides Additional Evidence of a Clear Trend Away From Medical Monitoring

Most recently, the highest court in Kentucky rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002). There, the plaintiff sought the creation of a court-supervised medical monitoring fund, for herself and as representative for a class of patients, to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination. The Kentucky Supreme Court, citing cases dating as far back as 1925, stated: "This Court has consistently held that a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at 852. The court concluded that "all of these cases lead to the conclusion that a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id.* at 853-54.

D. THE UNSOUND ALTERNATIVE: THE WEST VIRGINIA "ANYONE CAN SUE" APPROACH TO MEDICAL MONITORING

West Virginia provides a practical example of the adverse impacts of allowing medical monitoring claims for asymptomatic plaintiffs. In *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432-33 (W. Va. 1999), the Supreme Court of Appeals of West Virginia established an independent cause of action for an individual to recover future medical monitoring costs absent physical injury. The plaintiffs, who had no present symptoms of any disease, alleged that they were exposed to toxic substances as a result of defendants maintaining a pile of broken glass debris from the manufacture of light bulbs. The court set forth certain factors to guide courts in medical monitoring cases, but also said that the amount of exposure to a toxic substance required

to file a suit does not have to correlate with a level sufficient to cause injury. *See id.* at 433-34. As a result, in West Virginia, uninjured plaintiffs can sue for medical monitoring even when testing is not medically necessary or beneficial, and the plaintiff does not have to spend any of the award on actual monitoring. In a dissenting opinion, Justice Maynard asserted that "the practical effect of this decision is to make almost every West Virginian a potential plaintiff in medical monitoring cause of action." *Id.* at 435 (Maynard, J., dissenting).[8]

Now, it is not just West Virginians who are potential plaintiffs in medical monitoring cases filed in the state – thousands of uninjured people from other states are seeking to have their medical monitoring claims adjudicated en masse in West Virginia as well. For example, in *Stern v. Chemtall, Inc.*, No. 03-C-49M (W. Va. Kanawha County Cir. Ct. 2001), plaintiffs' lawyers filed a putative class action lawsuit for medical monitoring on behalf of thousands of uninjured people in seven states who had allegedly been exposed to toxic chemicals. The trial court's order certifying the multi-state class is currently before the Supreme Court of Appeals of West Virginia. *See Chemtall, Inc. v. Madden*, No. 31743 (W. Va.).

The court's rulings have caused concern even in West Virginia. *See, e.g.*, Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette, Mar. 1, 2003, at 5A, *available at* 2003 WL 5449929 ("[T]he *Bower* medical-monitoring ruling has cast a shadow over our state's reputation in the legal field. It affects West Virginia's jobs, taxes, health care and the public credibility of our courts."); Editorial, *Legislators Need to Restrict the Legal Industry on this One*, Charleston Gazette, Feb. 19, 2003, at 4A, *available at*

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[8] In February 2003, the West Virginia Supreme Court of Appeals applied *Bower* to reverse a circuit court order denying class certification to 5,000 users of an allegedly defective
(Footnote continued on next page)

2003 WL 5447407 ("People should be compensated for injuries caused by the negligence of others. But lawyers should not profit from imaginary harm.").

The West Virginia *Bower* ruling contributed to the state being named the only statewide "Judicial Hellhole" by the American Tort Reform Association for two years running. *See* Am. Tort Reform Ass'n, *Bringing Justice to Judicial Hellholes* 9-10, 18 (2003), *available at* <http://www.atra.org/reports/hellholes/report.pdf>; *see also Group's Unflattering Picture of State is an Accurate Label*, News & Sentinel (Parkersburg, W. Va.), Nov. 14, 2003 ("One infamous example cited by the association is the state Supreme Court's 'medical monitoring' rule. . . . It's no wonder the business world is afraid of West Virginia. And thus, it's no wonder we lag behind other states in creation of new jobs."). U.S. Chamber of Commerce studies in 2002, 2003 and 2004 also ranked West Virginia second to last among all states for creating a fair and reasonable litigation environment. *See* U.S. Chamber of Commerce, *2004 State Liability Systems Ranking Study: Final Report* 9, 15 (Harris Interactive, Inc. 2004), *available at* <http://www.legalreformnow.com/study030804.cfm>.

The view expressed in the West Virginia *Bower* case, that increased risk of future injury from exposure to a toxin is akin to a physical injury from a car accident, is false. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 841 (2002) [hereinafter "Henderson & Twerski"]. Professors Henderson and Twerski, who served as the Reporters for the recent Restatement, Third of Torts: Products Liability and are the nation's

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prescription drug, Rezulin, who sought to recover costs of medical monitoring. *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003).

leading academic tort experts, have written: "From the beginning of our negligence jurisprudence, 'injury' has been synonymous with 'harm' and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm." *Id.* at 842. Physical injury has been the "linchpin in determining the duties of care owed by defendants." *Id.* Allowing a claim without injury should be "neither 'only remedial' nor 'business as usual.'" *Id.*

II. THE LEGISLATURE, NOT THE JUDICIARY, SHOULD DECIDE WHETHER TO ADOPT MEDICAL MONITORING

Medical monitoring absent present physical injury presents an about-face to 200 years of substantive tort law. Medical monitoring claims "reject[] the prerequisite of palpable harm," eschewing "several time-honored tenets of personal injury litigation." Studdert et al., *supra* at 890, 894.

Whether Michigan should permit a claim for medical monitoring absent physical injury should be decided by the Legislature if it is to be adopted at all. The questions raised by medical monitoring claims are difficult and complex, presenting great changes to traditional tort law concepts. *See* Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 Rev. Litig. 551, 568 (1998).

A. ALLOWING MEDICAL MONITORING CLAIMS ABSENT PRESENT INJURY CONSTITUTES A SWEEPING CHANGE TO 200 YEARS OF TORT LAW THAT REQUIRES THE LEGISLATURE'S CONSIDERATION

For much of this nation's history, the role of courts has been to develop tort law in a slow, incremental fashion. In recent years, however, some courts have abandoned this incremental approach. This has resulted in potentially large adverse consequences to the nation's civil justice system and to those who must abide by its rules.

Allowing an award for medical monitoring where a plaintiff currently suffers no harm and has no symptoms of harm is an abrupt change from a fundamental principle of tort law, with the enormous potential for expense for defendants and harm to future claimants. As Professors Henderson and Twerski note:

> any attempt to embrace [medical monitoring] within the mainstream of traditional tort law is manifestly unwise. In truth, [medical monitoring claims] constitute radical departures from longstanding norms of tort law, advanced in recent years to bludgeon a disfavored group of defendants. But the wrongdoing of a defendant, or defendants, does not justify creating legal doctrine that is substantively unfair, especially when doing so strikes mercilessly at another group of plaintiffs who, when the funds to pay damages run dry, will be denied recovery for real, rather than anticipated, ills.

Henderson & Twerski, *supra* at 818. Professors Henderson and Twerski have warned that "as the massive number of uninjured claimants presenting anticipatory claims devours the defendants' resources, those defendants are forced into bankruptcy leaving nothing for those whose ills, when they eventually manifest themselves, are not the least bit speculative." *Id.* at 850. This potential for enormous expense "begs for a legislative solution rather than a judicial one." Martin & Martin, *supra* at 131

Moreover, if medical monitoring absent physical injury is to be adopted, such a sweeping change to substantive rights and responsibilities warrants legislative consideration so the change is done prospectively to provide "fair notice" to those potentially affected. *See, e.g.*, *Ball v. Joy Techs. Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (recognizing economic hardships that eliminating the physical injury requirement in medical monitoring cases would impose upon defendants and emphasizing the appropriateness of legislative consideration).

B. COURTS ARE NOT EQUIPPED TO ANSWER THE MANY QUESTIONS INVOLVED IN ALLOWING MEDICAL MONITORING CLAIMS

Developing an effective legal scheme for medical monitoring involves a number of complex scientific, medical and economic questions. For example, consideration must be given to the types of health conditions that may be monitored; the likelihood that monitoring will detect the existence of disease and the adverse consequences that false positives may bring; the types of substances and the level of exposure to those substances that may trigger the need for medical monitoring; the level of increased risk of developing an adverse health condition that may trigger monitoring and the measure of that increase; the types of tests to be used in monitoring; and the potential medical, scientific and economic downsides to medical monitoring; as well as how to structure the continuing administration of each patient's monitoring program. Consideration also must be given as to whether recognition of medical monitoring may threaten adequate and timely compensation to the truly sick, as well as to the effect of such awards on job growth and the economy.

1. Courts Cannot Effectively Answer the Question "For Which Health Conditions Should Medical Monitoring be Available?"

When courts make bright-line rules allowing medical monitoring of all types of health conditions, they disregard the critical medical understanding that medical monitoring is only appropriate for curable or treatable conditions. *See, e.g.*, *Bower*, 522 S.E.2d at 432-34 (expressly eliminating the requirement that plaintiff show the condition is treatable or curable in order to provide medical monitoring to help plaintiff achieve "the comfort of peace of mind"). Such decisions display a critical misunderstanding of the purpose of medical monitoring and illustrate

that courts do not have access to all the information that is needed to make sound decisions about appropriate medical monitoring.

Courts that allow medical monitoring claims must make scientific and medical decisions about which treatment is proper for specific plaintiffs. In some cases, plaintiffs' lawyers deluge the court with a battery of diagnostic tests they would like to see the court allow for their clients.[9] Critics have suggested that "[t]he all-too-transparent method behind this madness is to inflate as much as possible the cost of yearly monitoring per plaintiff so as to maximize plaintiffs' damage award and their attorneys' contingent fees." Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* 15 (2001). Courts must then decipher which of these suggested tests to channel the plaintiff toward by "[s]crutiniz[ing] the clinical efficacy of the [suggested diagnostic tests], and in some cases, even the treatments planned to follow identification of disease." Studdert et al., *supra* at 890. Adding complexity, this determination may change over time with emerging cures and treatments for current diseases and with the introduction of new types of diseases. *See* Beeler & Sappenfield, *supra* at 287. These problems are exacerbated in the class context.

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[9] The plaintiffs in *Paoli*, 113 F. 3d 444, requested the following diagnostic tests for their feared PCB exposure: amniocentesis, developmental and achievement testing, electrocardiography, pulmonary function tests, mammography, sigmoidoscopy, urine cytology, sputum cytology, basic immunotoxicology panel, chromosomal analysis, complete optomologic evaluation, complete cardiovascular evaluation, complete neurological evaluation, complete gastrointestinal evaluation, PCV detoxification, urinalysis, PSA, CBC, urine porphyrin, and male fertility evaluation.

2. Courts Cannot Effectively Answer the Question, "What Criteria Should Apply to Allow Medical Monitoring in a Given Case?"

Recognition of a medical monitoring claim may require courts to detail the criteria for when recovery is allowed, since open-ended recovery could deluge the courts with claims. *See* Henderson & Twerski, *supra* at 845 ("[C]ourts will face, in the long run, an overwhelming flood of litigation in this area."). Medical monitoring claims could have potentially gigantic proportions, because "[t]he specter of a massive, never-ending que [sic] of claimants is very real." *Id.* at 850. The enormity of the potential claims requires a thorough study of who should be eligible for medical monitoring, and under what conditions.

In an attempt to confine claims, courts that have permitted recovery for medical monitoring have established certain threshold criteria for these claims.[10] Yet, they have not demonstrated an ability to articulate consistent eligibility requirements for medical monitoring.[11]

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[10] *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824-25 (Cal. 1993) (listing five factors to determine the reasonableness and necessity of medical monitoring); *Bourgeois*, 716 So. 2d at 360-61 (establishing seven criteria necessary for recovery of medical monitoring damages); *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997) (setting forth seven factors a plaintiff must establish in order to prevail on a claim for medical monitoring). When courts set forth generalized factors, they often do not specify whether each element must be separately established, or whether all factors should be weighed together. *See also* McCarter, *supra* at 265.

[11] For example, courts usually require a showing of "increased risk" for disease. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 459, 461 (3d Cir. 1997), *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993). One court required the plaintiffs to show it was "reasonably" certain they would develop the need for medical monitoring. *Potter*, 863 P.2d at 823. Under any of these court-established standards, "[i]t is ... difficult to quantify the amount of increased risk imposed on an individual who does not yet have a disease ...." Allen Kanner, *Medical Monitoring: State and Federal Perspectives, in* Litig. 1988, at 549, 560 (PLI Litig. & Admin. Practice Course Handbook Series No. 363, 1988). Further, it is "difficult to conceptualize what that risk is worth in money damages," *id.*, especially where plaintiffs are being compensated for injuries which have not yet occurred and which ... probably never will." Carey C. Jordan,

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Too often, when courts have allowed recovery for medical monitoring, they have produced results allowing for unlimited recoveries.[12]

The different approaches taken by states show the difficulty in developing a new remedy. For example, in West Virginia, the plaintiff only has to show that "he or she has, relative to the general population, been significantly exposed" and "is not required to show that a particular disease is certain or even likely to occur as a result of exposure." *Bower*, 522 S.E.2d at 432-33. Instead, the plaintiff need only show that he or she "has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure" – but "no particular level of quantification is necessary to satisfy this requirement." *Id.* Yet, in Pennsylvania, a plaintiff must show a "significantly increased risk of contacting serious latent disease" as a result of "exposure greater than normal background levels." *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 145 (Pa. 1997). In Illinois, the plaintiff must demonstrate "a reasonable certainty of contracting a disease in the future." *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998).

States also have different standards for what medical basis is required for a medical monitoring claim. West Virginia's liberal standard provides that there "obviously must be some

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Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?, 33 Hous. L. Rev. 473, 487 (1996).

12 This was the case after West Virginia allowed medical monitoring in *Bower*, 522 S.E.2d 424. Shortly after *Bower*, plaintiffs' lawyers filed a class-action suit against the major cigarette manufacturers on behalf of approximately 250,000 West Virginia smokers who had not been diagnosed with any smoking-related illnesses, seeking medical monitoring damages. *See In re Tobacco Litig. (Medical Monitoring Cases)*, No. 00-C-6000 (W. Va. Ohio County Cir. Ct. 2001). Plaintiffs' lawyers also filed a seven-state class action on behalf of thousands of healthy plaintiffs seeking medical monitoring for alleged exposure

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reasonable medical basis" for medical monitoring, yet medical monitoring can be "based, at least in part, on a plaintiff's subjective desires ... for information concerning the state of his or her health." *Bower*, 522 S.E.2d at 433. Pennsylvania requires the "prescribed monitoring regime [to be] reasonably necessary according to contemporary scientific principles." *Redland Soccer Club, Inc.*, 696 A.2d at 146. Legislatures are best equipped to consider these issues.

In sum, this Court should rule that Michigan does not recognize claims for medical monitoring absent physical injury. Such a holding would stem the potential widespread filing of medical monitoring claims by unimpaired persons, particularly in the form of class actions. This, in turn, would enhance the courts' practical ability to deliver prompt justice to those who need it the most – the truly injured. In addition, such a holding would conserve financial resources to compensate persons who are actually hurt, rather than having those resources diverted to plaintiffs whose claims are "premature (because there is not yet any impairment) or actually meritless (because there never will be)." Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992). *See also* Hugh R. Whiting, *Remedy Without Risk: An Overview of Medical Monitoring,* 42 Contemp. Legal Notes Series 29 (Wash. Legal Found., Wash., D.C., Aug. 2002). Finally, such a ruling would allow the Michigan Legislature to consider this important public policy issue.

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to toxic substances. *See Stern v. Chemtall, Inc.*, No. 03-C-49M (W. Va. Kanawha County Cir. Ct. 2001).

CONCLUSION

For these reasons, *Amici Curiae* respectfully request this Court to rule that Michigan does not recognize claims for medical monitoring absent physical injury, and order that the Plaintiffs' medical monitoring claims be dismissed as a matter of law.

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PROOF OF SERVICE

STATE OF MICHIGAN)
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I hereby certify that I served a copy of the foregoing Brief of the Chamber of Commerce of the United States, American Tort Reform Association, National Association of Manufacturers, American Chemistry Council, Coalition for Litigation Justice, Inc., and Property Casualty Insurers Association of America as *Amici Curiae* in Support of Defendant-Appellant upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 3rd day of August, 2004, addressed as follows:

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day of August, 2004.

Notary Public

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